No. ~~730~~ 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THOMAS SCHWARTZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

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MAURY HUGHES
Republic Bank Building
Dallas, Texas

REUBEN M. GINSBERG
Texas Bank Building
Dallas, Texas
Counsel for Petitioner

E. DUNCAN & CO., Brief Printers, 1329 E. Jefferson, Dallas, Texas

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Thomas Schwartz, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 14th day of November, 1951, and in which petitioner's Motion For Rehearing was denied on the 31st day of January, 1952.

OPINIONS BELOW

No. 25,458

Thomas Schwartz, Appellant,

vs.

The State of Texas, Appellee.

Appeal from Dallas County

The offense is that of being an accomplice to the crime of robbery; the punishment, ninety-nine years.

One Jarrett and one Bennett, both escapees from an Ohio jail, came to Dallas a few days before February 17, 1950. On that day, after preparations which will be hereinafter shown, they went to the home of Dr. Shortal in that city, gained admittance by the use of firearms, tied up the servants and waited for Mrs. Shortal's return. When she did return, at pistol point she was forced to surrender her diamond rings and then locked in a closet. After leaving the Shortal residence, Jarrett and Bennett went to the pawnshop of appellant and left the diamond rings with him. They received a small amount of money, in comparison to the value of the jewelry, and expected appellant to dispose of the jewelry and compensate them further. Of these facts there seems to have been no controversy.

At the trial of appellant, Jarrett and Bennett both testified for the State and, in addition to the above, told of having entered into a conspiracy with appellant to commit a series of robberies, of having received arms and information as to whom to rob from appellant, and of having in accordance with this conspiracy performed the Shortal robbery and carried to him the fruits thereof for disposal and a division of the proceeds among the three of them.

Appellant denied the conspiracy and claimed that he received the diamonds as an innocent purchaser for value.

We shall attempt to discuss the questions presented by appellant in the order advanced.

Our attention is first directed to appellant's claim that there is no evidence other than the testimony of the two accomplice witnesses which tends to connect him with being an accomplice to the commission of the offense, and that their testimony is not sufficiently corroborated.

Jarrett told of purchasing a pistol from appellant at his pawnshop and returning it the next day because it would not fire. On this occasion, appellant remarked to Jarrett, "If you had a partner to work with, you might be able to make a good score." Thereupon, Jarrett introduced Bennett to appellant; and the three of them worked out a division of any spoils they might acquire by virtue of robberies contemplated, wherein appellant was to furnish the name of the party to be robbed, Jarrett and Bennett were to commit the robbery and bring the fruits thereof to appellant for disposal. An equal division of the proceeds was agreed upon.

At this juncture, appellant sent his assistant, a colored boy named Davis, up to the third floor to test the new gun being furnished Jarrett and which was later used in the Shortal robbery. Davis testified in corroboration as to this fact and, further, that at the instance of appellant following the Shortal robbery, he delivered fifty dollars

to Jarrett in person and sent a second fifty dollars under a fictitious name to Houston. This was shown to have been received by Bennett. Davis further testified that he saw Jarrett and Bennett in the pawnshop in company with appellant on another occasion prior to the Shortal robbery.

Jarrett testified that on the morning of the robbery, and in preparation therefor, appellant in the presence of Jarrett and Bennett called the Shortal Clinic to ascertain whether Dr. Shortal had left home. This was done so that they would not encounter Dr. Shortal when they went to rob his home.

Miss Kate Graham, the receptionist at Dr. Shortal's Clinic, corroborated Jarrett as to such a telephone call, as will be seen in our discussion of Bill of Exception No. 4.

In addition to the above, we find two telling portions of evidence tending to show appellant's connection with the fruits of the robbery after the same had been committed.

The witness Graham testified that some time following the robbery she received an anonymous telephone call at the Clinic making inquiry as to a reward for the missing diamonds. Immediately thereafter, at the suggestion of the police, she called appellant at his place of business and positively identified his voice as being the one that had made the reward inquiry.

We further find the testimony of the witness DeWitt, an insurance adjuster from whom the appellant made sur-

reptitious inquiry concerning the reward for the return of the Shortal diamonds following the robbery and their delivery to him for disposal by Jarrett and Bennett.

We feel that the recorded telephone conversations between Jarrett and appellant hereinafter discussed under Bill of Exception No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense.

Bill of Exception No. 1 complains of the playing before the jury of such records of conversations between the witness Jarrett and the appellant. These records were made in the Sheriff's office at the suggestion of the District Attorney for the purpose of securing evidence against appellant. Jarrett was then a prisoner and cooperated with the officers in making out the State's case. The medium of their communication was the telephone, Jarrett being in the Sheriff's office and appellant being at his pawnshop.

Illustrative thereof is an answer made by Schwartz to questions by Jarrett concerning securing the services of a lawyer and how much information the police had about the guns used in the robbery, when he said, "* * * you sit in the boat and we will get along better. There's no use of ten people drowning when one can drown and one can help the other."

Appellant leveled nine objections to the evidence, of which we will discuss those urged in his brief.

Appellant sought to invoke the terms of Section 605 of Title 47, U. S. Code Annotated; Telegraphs, Telephones and Radiotelegraphs, commonly referred to as the Federal Communications Act, by claiming that he did not consent to the making of the recordings or to their introduction in evidence and cites us opinions in several cases arising in Federal Courts.

Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court.

Prior to 1929, the statute, now Article 727a, Vernon's Code of Criminal Procedure, read,

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, *or of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

It now reads,

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, *or of the Constitution of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

In 1930, we said in *Montalbano v. State*, 34 S. W. (2d) 1100:

"* * * Article 727a, C. C. P., was amended so as to no longer require rejection of evidence obtained in violation of laws of the United States. There is no claim that the evidence was obtained in violation of any law of this State."

This evidence was not obtained in violation of the State or Federal Constitution or the statutes of Texas and was here admissible as against this objection.

Appellant next complains that the phonographic records were secondary evidence and that Jarrett himself was the source of the best evidence. We are cited no authorities. It appears to us that the complaint is not well taken.

Bill of Exception No. 4 complains that the witness Graham was permitted to testify as to having received an anonymous telephone call.

This testimony was in corroboration of the accomplice Jarrett, who had, prior to the receipt of the Graham evidence, testified that he was present when appellant called her on the telephone and told these details of the conversation, which she corroborated:

1. That the call was made in the morning of the day of the robbery.
2. That it was made to Dr. Shortal's Clinic.
3. That the person calling inquired about the whereabouts of Dr. Shortal and told of an alleged automobile accident between Mrs. Shortal's car and that of the caller.

4. The refusal of the caller to give his telephone number.

From this we conclude that the trial court was possessed of sufficient facts to cause him to believe that the two witnesses were talking about the same conversation and that the witness Graham was corroborating the witness Jarrett. Though not conclusive, this was certainly persuasive of the fact that Jarrett spoke the truth.

In 22 Corpus Juris Secundum, Section 644, page 984, we find the following:

> "*Telephone Conversations*
>
> "The completeness of the identification goes to the weight of the evidence, and not to its admissibility. Whether evidence of a telephone conversation is admissible rests in the discretion of the trial court.
>
> "It has been said the rule does not define any one method or way of making a telephone conversation admissible; and there is no rule of evidence which requires that every witness to a conversation shall himself identify the participants in it, identification by others being considered sufficient. Although it has been said that ordinarily the witness must recognize the declarant's voice, it has been held that it is not imperatively necessary that the voice of the person talking be recognized by the other party to the conversation. The requisite identity may be established - - - by a third person listening to such conversation."

Bill of Exception No. 6 complains of two separate and distinct rulings of the Court:

1. Permitting the witness Bennett to testify about a certain pistol which he received from appellant.

2. The failure of the Court to grant appellant's requested charge concerning such testimony.

So framed, the bill complains of two matters, is therefore multifarious and presents nothing for review.

Appellant, in his Bill of Exception No. 5, seeks to raise a question that, by proving the method of division agreed upon among the thieves, the State proved another extraneous and substantive crime; to wit, conspiracy to commit a crime. We do not think the objections made at the time raised the question. However, we go further and say that such a holding would preclude the State from making out its case involving an accomplice as in the case at bar, because in so doing another offense would have been shown.

The witness Jarrett, in recounting the general working agreement made between the thieves prior to any discussion of the Shortal robbery, was asked, "At that time did you make any agreement between you and Bennett and Schwartz—make any agreements as to the distribution of properties taken in robbery?" His answer was, "Yes, we did. After we discussed the fine points and got down to splitting up of any loot on any of the robberies, he said, 'You go along with me and I will go along with you fellows, and we will split one-third (1/3) on all robberies—."

When the question of the Shortal robbery was later raised, it was unnecessary for them to have a separate arrangement for the division of the spoils thereof, because this understanding had already been reached. An accurate recounting of the facts made this particular type of proof necessary.

The bill does not reflect that the jury heard any further mention of extraneous offenses other than that the plural "robberies" was used, as shown above. It appears to us that the careful trial judge limited the State's proof in this respect. The agreement entered into, though it embraced other crimes, was legitimate proof.

We do not feel that the bill reflects error.

Bill of Exception No. 3 complains that appellant was not permitted to recount a conversation he had with one Fink, who was not offered as a witness, in order to more fully make explanation of his recent possession of stolen property. The Court's qualification shows conclusively that appellant's agreement with Fink concerning the disposition of the diamonds had been fully covered in other portions of the testimony of the witness. We find nothing material in the excluded hearsay testimony not covered by that actually admitted in evidence.

Bill of Exception No. 2 contends that appellant was deprived of the opportunity to prove that his assistant tested all firearms by shooting them out of the window before a sale, or "lease" in the terminology of the pawnshop, was

consummated. An examination of the statement of facts shows that such evidence was actually adduced from the same witness when he was permitted to testitfy, "My purpose in going up there was to try the gun out to see if it would shoot all right; we do that whenever we 'lease' them." Hence the bill shows no error.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Judge

(Delivered November 14, 1951)

No. 25,458

Thomas Schwartz, Appellant,

vs.

The State of Texas, Appellee.

Appeal from Dallas County

OPINION ON MOTION FOR REHEARING

Appellant has filed two lengthy briefs in this court asking for a rehearing herein and for a reversal of this cause, all of which are but a reiteration of his original brief and argument with the exception of one claimed newly discovered point which was not offered in the first hearing in this matter.

We adhere to our views as expressed in the original opinion herein and will attempt to write briefly on the

new proposition which is raised, as follows: It is claimed that appellant, who was charged herein as an accomplice to robbery, under the facts, should have been charged as a principal rather than as an accomplice.

We are of the opinion that the facts, as presented here, to a certain extent, would bear out appellant's contention relative to his principalship except for the fact that there seem to be lacking cogent elements of a principalship, as follows: (1) the actual presence of the accused on the scene of the robbery at the time of the commission of the offense, and (2) the actual performance of an act by the appellant relative to such conspiracy at the time of the commission of such robbery. Herein, it is not shown that he was present, or kept watch, or that he did any act in furtherance of the robbery at the time of its commission so as to make him a principal therein. As we see it, the question as to the constructive presence of the appellant is not in the case.

Article 69 of the Penal Code reads as follows:

> "Any person who advises or agrees to the commission of an offense and *who is present* when the same is committed is a principal whether he aid or not in the illegal act." (Italics supplied)

Article 70 of the Penal Code reads as follows:

> "An accomplice is one *who is not present* at the commission of an offense, but who, before the act is

done, advises, commands or encourages another to commit the offense; or

* * * * *

"Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same." (Italics supplied)

Under the facts of this case, we find appellant at the time of the commission of the offense busily engaged in his place of business and daily avocation where he usually stayed. Appellant seems to have been doing absolutely nothing in furtherance thereof at the time of the commission of this offense, and was surprised by the rapidity with which the two thieves had executed that which he had previously commanded and encouraged them to do in the commission of such offense.

The charge here alleged is that the appellant, though not present at the time of the commission of the offense, had prior thereto advised, commanded and encouraged others to commit it. The proof established the charge, and also established that in accordance with the conspiracy agreement, the appellant received the fruits of the crime and had control over their disposition, except that the co-conspirators were to share in the fruits of the sale after the disposition of the stolen property; and the cited case of *Johnson v. State*, 206 S.W. (2d) 605, holds that in such event the accused was an accomplice rather than a principal.

Believing that appellant was correctly charged and proven as an accomplice, the motion for a rehearing will be overruled.

Graves, Presiding Judge.

(Delivered January 30, 1951)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 14th day of November, 1951 to which petitioner filed a Motion For Rehearing, which motion was overruled on the 31st day of January, 1952. The jurisdiction of this Court is invoked under 28 U.S. Code Annotated Section 1257(3). Defendant objected to the admission of certain phonograph records obtained in violation of Section 605, Title 47, U.S. Code Annotated, at the time of trial before the Criminal District Court No. 2 of Dallas County, Texas, the Honorable Henry King, District Judge, presiding, which objection was overruled and exception thereto duly noted. (R. p. ——). The objection was renewed in Defendant's First Amended Motion for a New Trial, (R. p. ——), which motion was overruled, and judgment was entered (R. p. ——), whereupon defendant in open court excepted to such judgment and gave notice of appeal to the Court of Criminal Appeals of the State of Texas, at Austin, Texas. (R. p. ——). Defendant further raised the objection in his Bill of Exceptions No. 1 to which no qualification was appended by the said

Henry King, District Judge (R. p. ——). Defendant cited as error the failure to exclude the evidence obtained in violation of Section 605, but the Court of Criminal Appeals of the State of Texas in its opinion did not pass on the question of whether or not a violation had occurred, but characterized the statute as a procedural one, hence not applicable (R. p. ——). Defendant in his Motion For Rehearing again urged the court to correct the error of denying petitioner his right to have the phonograph records excluded as having been obtained in violation of Section 605 (R. p. ——), but the court in its opinion overruling the Motion For Rehearing stated that they adhered to their views expressed in the original opinion (R. p.—). Whereupon petitioner obtained a stay of execution of 90 days pending the perfection of his application for a Writ of Certiorari in this Court.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in denying the supremacy of the Federal Communications Act, 48 Stat. 1103, 47 U.S. Code Annotated 605 (Supp. 1951) in violation of Article VI of the Constitution of the United States, thus denying petitioner a right claimed under a statute of the United States.

STATUTES INVOLVED

The perinent statutory provisions are printed in Appendix A, infra, pp. 31-32.

STATEMENT OF THE CASE

On the 25th of March, 1950, your petitioner, Thomas Schwartz, was indicted by the Grand Jury of Dallas County, Texas, charged with being an accomplice to armed robbery. Specifically the indictment charged "that on February 17, 1950, one William Trent Jarrett robbed Mrs. Minnie Shortal of valuable jewelry, and that prior to the commission of said offense by the said William Trent Jarrett, the said defendant Thomas Schwartz did unlawfully and wilfully advise, command and encourage the said William Trent Jarrett to commit said offense, the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett."

On the third trial of this case before a jury in the Criminal District Court of Dallas County, Texas, your petitioner was found guilty and the jury assessed a penalty of ninety-nine (99) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Petition for Writ of Certiorari is directed.

William Trent Jarrett and a man by the name of Lester Bennett were indicted for the actual robbery of Mrs. Minnie Shortal, a resident of Dallas County, Texas. After the affirmance of petitioner Schwartz' case, Bennett pleaded guilty before the Court and the Court sentenced him to serve eight years in the penitentiary. Jarrett was

returned to the State of Kentucky, where he was already under a life sentence before he escaped and came to Texas, no formal disposition having been made of the robbery case against him in Dallas, Texas.

The evidence reveals that on the afternoon of February 17, 1950, the robbers Jarrett and Bennett, armed with pistols, entered the fashionable home of the prosecutrix, Mrs. Minnie Shortal, and at pistol-point robbed her of certain diamond rings and jewelry. At the time of the perpetration of the robbery, they locked her in a closet and tied up with cords the butler and maid servants.

The robbers Bennett and Jarrett then took the jewelry in question to the pawn shop of your petitioner Thomas Schwartz to pawn or dispose of same. Your petitioner testified that he agreed to purchase the jewelry after same had been appraised by a competent appraiser. He denied he had any part in planning the robbery.

The defendants Jarrett and Bennett, the actual robbers, turned State's evidence and testified for the State, Jarrett being the State's star witness. Jarrett testified it was Schwartz who turned him over to the police.

Schwartz returned all of the jewelry to Mrs. Shortal through the witness Fritz, Captain of Detectives.

Under the law of the State of Texas the testimony of an accomplice must be corroborated and the principal corroboration relied upon by the State was an intercepted

telephonic conversation which was recorded, the conversation being between your petitioner Schwartz and the robber Jarrett.

The testimony reveals that while Jarrett was confined in jail, that he was taken by the District Attorney and his assistants into a room in the Sheriff's office, where a recording machine was set up. Under the direction of the District Attorney's staff, Jarrett telephoned to Schwartz at his pawn shop, and some fifteen or twenty conversations were intercepted and recorded without the knowledge or consent of your petitioner. Six of these recorded conversations were played to the jury on the phonographic record. It is the contention of your petitioner that without this testimony a conviction could not be had, and that "wire tapping" evidence brought about your petitioner's conviction.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Criminal Appeals of the State of Texas erred:

1) In holding that Section 605, Title 47, U.S. Code Annotated, known as the Federal Communications Act, is a federal procedural statute and not binding on all states and judges as the supreme law of the land.

2) In denying to petitioner his rights granted him by Section 605, Title 47, U. S. Code Annotated, against divulgence of intercepted communications without his consent

and thereby denying the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States.

REASONS FOR GRANTING THIS WRIT

1. The Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction rests primarily upon the recorded telephone conversations between petitioner and Jarrett when it says:

> "We feel that the recorded telephone conversations between Jarrett and appellant hereinafter discussed under Bill of Exceptions No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense." (R. p. ——).

The court recognizes petitioner's timely objections to the evidence in claiming his rights granted under Section 605, but says:

> "Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court." (R. p.——).

The Court of Criminal Appeals of the State of Texas erred in characterizing the Federal Communications Act as a procedural statute. The source books define a substantive law as one that conveys substantive rights to an individual, a procedural law as one that directs the method of procedure to protect the substantive rights given

the individual. Words and Phrases, Vol. 2, p. 392; Vol. 40, p. 524.

Rules of evidence constitute substantive law and cannot be governed by rules of court. *State v. Pavelich*, 279 P. 1102, 153 Wash. 379.

That the right created by the statute is a personal right is not open to question. This Court held in *Goldstein v. U. S.*, 318 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (NY 1942) that Section 605 is intended to protect only the sender and he alone can invoke it. Moreover, it was held in that case that intercepted communications are admissible against one not a party to the communications. Hence, Congress gave a substantive right to individuals to be free from interference in their use of communications facilities. The statute does not merely prescribe procedure, it creates a right in an individual which only he can claim.

In order to further protect the right created by the Act, Congress established a general penalty for the violation of such right. 48 Stat. 1100, 47 U.S. Code Annotated 501. It is clear that a statute which creates personal rights in an individual and makes the violation of such right a felony, can in no sense be characterized as a procedural statute.

The harm in such erroneous characterization as made by the Court of Criminal Appeals of the State of Texas is that it nullifies the express intent of Congress, as con-

strued by this Court, as well as ignores the mandate of Article VI of the Constitution of the United States. If the Act is a procedural one, then it would not be binding upon the courts and judges of the State of Texas. Likewise the court avoids the necessity of expressly denying the supremacy of an Act of Congress. If the Federal Communications Act had expressly created a cause of action for the violation of Section 605, then "(T)he Act creating the cause of action, being enacted pursuant to the United States Constitution, is the supreme law of the land, and binding on state courts and judges". *Bowles v. Angelo*, 188 SW 2d 691, 694 (Tex. Civ. App. 1945). The court in that case cited *Claflin v. Houseman*, 93 U.S. 130, 136, 23 L.Ed 833, quoting therefrom: "Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

It is clear therefore that if Section 605 created a substantive right, the Texas Courts would be bound to recognize such right as the supreme law of the land.

This Court held in *Nardone v. U. S.*, 302 U.S. 379, 58 S. Ct. 275 (1937) that the evidence obtained in violation of the right created by Section 605 must be excluded. Since the statute creates a right in the sender and he alone can claim it, *Goldstein v. U. S.*, 318 U.S. 114, 62 S. Ct. 1000

(1942) then neither such right nor the statute creating it can be characterized as procedural. Hence the refusal of the Court of Criminal Appeals of the State of Texas to reverse the conviction and exclude the recordings because the court finds that the statute was a procedural one only, is clearly error and should be reversed.

The Court of Criminal Appeals further justified its decision by reference to Article 727a, Vernon's Code of Criminal Procedure. Prior to the amendment of this statute, it operated to exclude evidence obtained in violation of a statute of the United States of America, in addition to other exclusions. In 1929 the statute was amended to permit the use of evidence obtained in violation of a federal statute. *Montalbano v. State*, 116 Tex. Crim. Rep. 242, 34 SW 2d 1100 (Tex. Crim. App. 1930). This statute precedes the adoption of Section 605 and cannot control where Congress has legislated in an area in which it may constitutionally do so. A state does not have the power to invalidate a right created by Congress. Under the Angelo case, 188 S. W. 2d 691 (Tex. Civ. App. 1945) the courts of Texas are committed to the rule of the Claflin case, 93 U.S. 130, 23 L.Ed. 833, recognizing the supremacy of an Act of Congress. Moreover, the case of *Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, reaffirmed and strengthened the rule of the Claflin case. It follows therefore that Congress having created a right in individuals, the law is binding alike upon all states, courts and the people.

2. The decision of the Court of Criminal Appeals of the State of Texas is erroneous because of the failure to recognize the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States. Even if there were a fixed policy in Texas contrary to the policy expressed by Congress in Section 605, it would not alter the case.

> "For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which relied chiefly upon the Claflin and Mondou precedents, this Court stated that a state cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers' ". Testa v. Katt, 330 US 386, 393, 91 L. ed. 967, 972.

It would appear, therefore, to be settled by this Court that valid laws of the United States are the Supreme Law of the land, and the judges in every state and all courts are bound thereby.

This Court in *Nardone v. U. S.*, 302 U.S. 379, 58 S. Ct. 275 (1937) held that the words of Section 605 "forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person'. To recite the contents of the message in testimony before a court is to divulge its message." Neither the language of this decision or the language of the statute limit in any way a tribunal in

which this prohibition is to operate. It lays down a general rule which in the absence of limiting words must be accepted as a public policy. In a subsequent hearing of this case, *Nardone v. U. S.*, 308 U.S. 338, 340, 84 L.Ed. 307, 311, this Court, per Mr. Justice Frankfurter, said in reference to the opinion in the first Nardone case:

> "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with the ethical standards and destructive of personal liberty'. 302 US 379, 384, 82 L. ed. 314, 317, 58 S. Ct. 275."

This Court by unanimous decision held in *Weiss v. U. S.*, 308 U.S. 321, 84 L.Ed. 298, that the exclusion of evidence obtained in violation of Section 605 is not limited to interstate and foreign commerce, that Congress has the power, when necessary for the protection of interstate commerce to regulate intrastate transactions. Shreveport Case (*Houston, E & W T. R. Co. v. U. S.*) 234 U.S. 342, 58 L.Ed. 1341, 34 S. Ct. 833.

That there was an interception in the case at bar is beyond doubt. The circumstances here are virtually identical with those in *U. S. v. Polakoff et al*, 112 Fed. 2d 88, (CCA 2d), cert. denied 311 U.S. 653, 85 L.Ed. 418, and is clearly distinguishable from *Goldman v. U. S.*, 316 U.S. 129, 86 L.Ed. 1322. Moreover, it is important to note

that in the case at bar, the state did not merely offer testimony concerning the conversations, but the recordings themselves were offered in evidence and admitted in evidence by the trial judge, not by way of impeachment, but as direct evidence.

The decision of this Court in the Weiss case, supra, clearly shows that Congress did not limit the application of Section 605 to the Federal courts, nor lay down a policy applicable only to the Federal courts. Nowhere does the statute make any reference to courts. The Nardone cases together with the Weiss case make it abundantly clear that the statute was the promulgation of a broad public policy in a field in which Congress was competent to legislate. As the Court has said, any other holding would be denying "a decent respect for the policy of Congress". The language of the statute commands that "no person not being authorized by the sender shall intercept any communication and divulge or publish . . . such intercepted communication to any person". There are no words of limitation in this clause such as exists with reference to the other clauses in the section. The statute does not lay down a rule of procedure for any courts; it lays down a rule of substantive law. Even if it were a rule of procedure, Congress would nevertheless have the power to prescribe a procedural rule which would become the supreme law of the land. The federal law has reached into procedure in other instances. It has been held that internal revenue agents may not be compelled by State courts

to testify in a manner prohibited by treasury department regulations. *Boske v. Comingore*, 177 U.S. 459, 20 S. Ct. 701 (1900). Likewise a provision of the Federal Bankruptcy Act, 30 Stat. 548 (1898) amended 52 Stat. 847 (1938), 11 U. S. Code Annotated 25 a(10) (1940), provides that "no testimony given by him (a bankrupt) shall be offered in evidence against him in any criminal proceeding." Irrespective of whether it purports to govern procedure or not, and nothing in the statute lends support to the theory that it is a procedural statute, Section 605 created a right which became the supreme law of the land, binding on all judges in all states "any Thing in the Constitution or Laws of any State to the contrary notwithstanding". The case of *Testa v. Katt*, supra, would appear to be conclusive on this point. Clearly, if the words "divulge to any person" comprehends testimony in a court, and bars such testimony in a Federal court, the language likewise bars such testimony in a State court. This Court, in the Weiss case, refused to engraft by construction restrictions and limitations which do not appear in the statute. The Court found that the changed wording in the second and fourth clauses had significance and were not inadvertent. There is nothing in the language of the statute to show that Congress intended to limit the prohibition to Federal courts. In fact, there is no holding that there exists such a limitation as to any Court. If the policy is to be effective and the public policy upheld, the Court cannot engraft restrictions and limita-

tions which do not appear in the statute. Should the Court refuse to so hold, the protection afforded by the statute and the underlying policy which this Court has documented in great detail, against invasion of privacy and protection of commerce, would be narrowed to the vanishing point, for the bulk of criminal prosecutions occur in the state courts. In addition, Congress could grant concurrent jurisdiction to state courts to prosecute federal crimes in state courts, thereby nullifying completely the effect of Section 605. In the early days of the republic, Congress did grant concurrent jurisdiction to the state courts to enforce federal statutes, and may constitutionally do so again. Warren, Federal Criminal Laws and the State Courts, 38 Harvard L. Rev. 545. Moreover, in most federal crimes, there is likewise a state crime, so that federal authorities could defer to state prosecuting authorities, and federal officers could testify in state courts as to the contents of any intercepted communications.

Some of the recent cases confuse the rule of *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1782, with the rule of the Testa case. *People v. Channell*, 236 P. 2d., 654, (Cal. App. 1951) We are not concerned here with the rule dealing with admissibility of evidence illegally obtained or the state rules pertaining thereto. It is contended that the Federal Communications Act, being a valid exercise of Congressional authority in an area in which Congress is

authorized to legislate, is an expression of Congressional policy which supersedes local rules and must be given effect as the supreme law of the land pursuant to Article 6 of the Constitution of the United States. No state may decline to enforce the statute because of any conflict with local law or policy. *Sou. Pac. R.R. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed. 1915; *Southeastern Underwriters Asso. v. South Carolina*, 322 U.S. 533, 58 S.Ct. 1162, 88 L. Ed. 1440.

There have been cases which presented similar questions. In *Rowan v. State*, 175 Md. 547, 3 A. 2d. 753, the decision antedated this Court's decision in the Weiss case and cannot be deemed controlling. In any event, a state court is not competent to pass on the validity of a Federal Statute. In two instances, *People v. Kelly*, 22 Cal. 2d 169, 122 P. 2d. 1, cert. denied, 320 U.S. 715, 64 S.Ct. 264, 88 L.Ed. 1420, rehearing denied, 321 U.S. 802, 64 S.Ct. 527, 88 L.Ed. 1089; *Hubin v. State*, 180 Md. 279, 23 A. 2d. 706, cert. denied, *Neal v. State of Maryland*, 316 U.S. 680, 62 S.Ct. 1107, 86 L.Ed. 1753, the issue presented to the Court involved situations where the defendants were not the senders of the communications and therefore came within the rule of the Goldstein case.

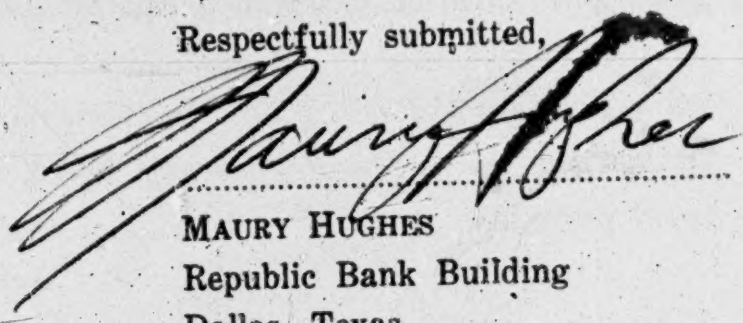
This Court has not heretofore had the opportunity to pass on the question presented in the case at bar, yet the issue presented here is one which only this Court can

resolve. There is a marked increase in the invasions of privacy and encroachments on individual liberties. Congress promulgated a public policy for the protection of interstate commerce and there has been no change in the philosophy which gave rise to the public policy expressed by Section 605, and no expression by Congress that the policy has been altered. There have been repeated attacks against the policy and innumerable instances where the penal provisions created for violation of Section 605 have been disregarded with impunity. The rule of *Erie v. Thompkins*, 302 U.S. 671, 58 S.Ct. 50, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, would require the same policy to govern in every state, otherwise in a diversity case, the applicable rule would vary from state to state since admissibility of evidence being substantive, the Court would be required to follow the local rule. It is clear that Congress intended no such result, yet unless the Federal Communications Act is held to be applicable as the supreme law of the land, the protection afforded interstate commerce would vary from state to state. It is therefore of the greatest importance that it be resolved by this Court whether the states are bound by Section 605 of the Federal Communications Act or whether the statute is to be reduced to mere verbiage.

CONCLUSIONS

For the foregoing reasons, this Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

Respectfully submitted,



MAURY HUGHES
Republic Bank Building
Dallas, Texas

REUBEN M. GINSBERG
Texas Bank Building
Dallas, Texas
Counsel for Petitioner

APPENDIX

A. Statutes

48 Stat. 1103, 47 USCA 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to a proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of Competent Jurisdiction, or on demand of other lawful authority;

And no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

And no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

And no person having received such intercepted communications or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

PROVIDED, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

48 Stat. 1100. 47 USCA 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term not more than two years, or both.

Article 727(a), Vernon's Code of Criminal Procerure:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or Laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.